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No. 94-653

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

JACOBS MANUFACTURING COMPANY,
Petitioner,
v.
SAM BROWN COMPANY,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Court of Appeals, in a fact-intensive diversity case under Missouri law, properly reversed the trial judge and directed reinstatement of a jury verdict where the trial judge, ignoring compelling evidence that supported the verdict, disagreed with the jury and granted a new trial because he would have found the facts differently.

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RESPONDENT'S BRIEF IN OPPOSITION

STATEMENT OF THE CASE

A. The facts not mentioned by Jacobs in its Statement.

Jacobs' Statement is unacceptable because, mindful of its Rule 15.1 obligation, Sam Brown Company ("SBC") considers it to be misleading, inaccurate and incomplete.[1] These further facts, and other compelling facts detailed by the Court of Appeals, were not mentioned by Jacobs.

Since Jacobs Manufacturing Company ("Jacobs"), in its printed form agreement, reserved the right to make certain direct sales, SBC's owner and CEO, Bernard Brown, expressed his deep concern when the parties first met. Mr. Brown's concern was dispelled by Jacobs at the out-

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[1] Pursuant to Rule 29.1, SEC states that it does not have any parent corporation nor any non-wholly owned subsidiaries.

set of the parties' eight-year relationship. Brown Tr. 87-95.[2] If it had not been, and had Mr. Brown known that even then Jacobs was considering plans to dump its network of exclusive distributors, his company would never have made the investment or incurred the enormous bank debt that it did. Brown Tr. 466.

From the beginning, Mr. Brown was assured by Jacobs that the provisions in the printed agreement that he had questioned were just "boilerplate." He had nothing to be concerned about, he was told, because if SBC did a good job and made the investment required, the relationship between the parties was a "marriage" and a "lifetime deal." Brown Tr. 92-93, 132, 134; Tr. 218, 230, 609.

This was why, when a nationwide recession struck the trucking industry in 1980, SBC continued for the next three years, at Jacobs' urging, to "hang in there" and absorb the losses it did. SBC was told by Jacobs that when the good times returned, it would be rewarded by future business. Tr. 609-610. Yet, all along, Jacobs was secretly considering plans to dump its traditional distributors. As early as 1979, it even sent a spy to SBC so that he could find out how a Jacobs distributor operated its business and report back to Jacobs. SBC App. tab 45-2; Brown Tr. 197-198. In June 1981, Jacobs secretly adopted just such a plan to eliminate its traditional distributors, the one recommended in the Bain Report, for which it paid $100,000. SBC App. tab 52; Tr. 708.

In September 1983, Jacobs dropped its bombshell. Just as the recession was ending, it announced its new "single price strategy." Beginning January 1, 1984, it would sell its products directly to "anyone who uses [them]" for the

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[2] For the Court's convenience, all transcript, appendix and addendum citations conform with the abbreviations in the Petition. However, unless requested by the Court to do so, we have no intention of "lodging" with the Clerk, as Petitioner has done, exhibits and pages lifted out of fair context from a more than 2,000 page trial transcript and record on appeal.

same price, to Jacobs distributors and their customers alike. SBC App. tab 37; Brown Tr. 250-252, 256-257. As SBC's vice-president put it, it was "our divorce that came by mail." Tr. 620.

Comparing the elements of the program announced, including the establishment of an in-house Jacobs sales force, with the elements of the "very carefully staged" program Bain had recommended more than two years earlier, they were virtually identical. SBC App. tab 37; SBC Add. tab 9-3,4.

Although Jacobs claimed it was forced to meet anticipated competition from the Cummins Engine Company, it was a pretext only. Long before the recession started, and even while repeatedly urging SBC to "hang in there," Jacobs fully expected competition from Cummins upon the expiration of its Jake Brake patent. Tr. 397, 414. It was even addressed in the 1981 Bain Report. SBC Add. tab 9-4.

SBC was not the sole objector, as Jacobs misleadingly implies in its Statement (Pet., p. 5). It was indeed unique, however, in that SBC had become Jacobs' top distributor in the nation. By Jacobs' own documented admission, dissension over the new program was rampant among its traditional distributors, many of whom adopted an adversary posture and "threatened legal action." SBC Add. tab 11-2.[3]

The callous and uncaring nature of Jacobs' deceit was confirmed in a confidential in-house report which, like other appalling evidence, the trial court neither addressed nor mentioned. It stated (SBC Add. tab 11-2):

> Jacobs' anouncement of the 1984 Single Price Strategy irrevocably has changed the traditional role of

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[3] **Had Martin Diesel's James Martin of Defiance, Ohio, been allowed to testify, he would have confirmed similar misrepresentations and how "the whole bunch of [distributors] got together and discussed the kick in the butt" Jacobs had given them. Tr. 199.**

> our distributors. Distributors, as we have known them, must either change or die. Most will probably die.

Pleading for SBC's business life and imploring Jacobs to reconsider, Bernard Brown wrote Jacobs on December 30, 1983. Upon receipt of his letter, which was produced by its counsel during pretrial discovery, Jacobs scrawled across the top of it (SBC Add. tab 10-1):

> —DO NOT REPLY IN WRITING
>
> —SOMEONE WITH RAPPORT VISIT HIM
>
> —GIVE HIM A CRUMB

Its business destroyed, SBC refused to be placated. A few months later, Jacobs sued SBC for the unpaid balance purportedly due on its open account and SBC counterclaimed for fraud.

B. Proceedings in the District Court.

The above facts, which the record on appeal confirmed, were ignored by the trial judge. App. B, p. 16a, *et seq.* Inexplicably, he did not even mention this evidence when, without the benefit of a trial transcript, he granted Jacobs' motion for JAML and, in the alternative, a new trial sixteen months after the jury returned its verdict. App. A, p. 5a.

Although the trial judge ridiculed what he considered to be the "disdainful tone of voice" of SBC's CEO, nowhere in his opinion did he find Mr. Brown to be a witness unworthy of belief. Neither did he cite, unlike the Court of Appeals in its opinion (App. A, pp. 6a-9a), the controlling Missouri precedents that hold the reasonableness of a fraud victim's reliance and proximate cause are questions of fact for a jury to determine.[4]

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[4] After finding that the Missouri law on punitive damages passed Constitutional muster, the trial judge did later criticize the Missouri Supreme Court's Approved Instruction on punitive damages. App. B, p. 39a. Sixteen months earlier, however, during the in-

C. Proceedings in the Court of Appeals.

A unanimous panel of the Court of Appeals concluded that the trial judge erred in granting Jacobs JAML, a ruling that Jacobs no longer questions (Pet., p. 12 n.12). It also concluded that the trial judge erred in granting Jacobs' alternative motion for new trial. App. A, p. 14a.

Although Jacobs implies in its Statement (Pet., p. 11) that the Court of Appeals failed to find that the trial judge abused his discretion when he granted a new trial, this is not so. A reading of its opinion makes it plain this is precisely what the Court of Appeals concluded. Not only did it state, "We conclude the district court abused its discretion in vacating the damages awarded [to SBC] for lost future profits," but it also ruled that "the jury did not abuse its discretion in fixing the amount of punitive damages." App. A, pp. 10a-11a.

Considering Jacobs' net worth of over $51 million, SBC's actual damages of nearly $2.5 million, and "the continuous nature and magnitude of Jacobs' deceit" which the trial judge never addressed, the unanimous panel ruled that the $2.7 million punitive damages award was neither unreasonable nor "could [it] only have resulted from irrational jury behavior." App. A, p. 12a.

In short, Jacobs' statement to the contrary notwithstanding, the Court of Appeals did conclude that the trial judge abused his discretion by granting Jacobs a new trial.

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struction conference in chambers and before that issue was submitted to the jury, Jacobs' trial counsel stated, "I think the jury instruction as proposed as guidance for the jury on the punitive damage issue, if the Court decides to submit it, is in accordance with Missouri law." Tr. 1427. Having so stipulated, thus waiving any instructional issue, Jacobs should not now imply that it was somehow preserved. This is also true of Jacobs' innuendo (Pet., pp. 9-10) regarding any purported inconsistent submission, an objection never raised during the trial.

SUMMARY OF ARGUMENT

The decision of the Court of Appeals in no way conflicts with any applicable precedent of this Court. To the contrary, it is consistent with all of them, including *Honda Motor Co., Ltd. v. Oberg,* —— U.S. ——, 114 S.Ct. 2331, 129 L.Ed.2d 336 (1994); *Pacific Mut. Life Ins. Co. v. Haslip,* 499 U.S. 1, 111 S.Ct. 1032, 113 L.Ed.2d 1 (1991); *TXO Production Corp. v Alliance Resources Corp,* —— U.S. ——, 113 S.Ct. 2711, 125 L.Ed.2d 366 (1993); and *Allied Chemical Corp. v. Daiflon, Inc.,* 449 U.S. 33, 101 S.Ct. 188, 66 L.Ed.2d 193 (1980) Moreover, it raises no issues of special importance and does not depart in the slightest from the usual course of proper appellate review.

Although a trial judge has broad discretion to grant a new trial, it is not unlimited. As the Court of Appeals correctly determined, the trial judge here clearly abused his discretion by (1) addressing the evidence selectively, (2) ignoring the evidence that supported the jury's verdict; (3) substituting his own view of a key witness' testimony and demeanor, including his tone of voice, without questioning his truthfulness; and (4) concluding that the jury must have been directed by emotion rather than reason only because, based on his own selective evaluation of the evidence, he would have found the facts and drawn the factual inferences differently.

Accordingly, settled precedent required the trial judge to be reversed because he invaded the province of the jury, thereby violating SBC's right to a jury trial, by disregarding the compelling evidence that supported the jury's verdict.

REASONS FOR DENYING THE PETITION

I. THE DECISION OF THE COURT OF APPEALS DOES NOT CONFLICT WITH APPLICABLE PRECEDENT AND NO ISSUES OF SPECIAL IMPORTANCE ARE PRESENTED.

Although Jacobs claims that the decision of the Court of Appeals is somehow in conflict with recent precedents of this Court, specifically, *Honda, Haslip* and *TXO,* there is no such conflict. Neither are any issues of special importance presented.

Jacobs' reliance on *Honda Motor Co., Ltd. v. Oberg, supra,* is clearly misplaced. As this Court stressed in *Honda,* —— U.S. at ——, 114 S.Ct. at 2339-2341, 129 L.Ed.2d at 346-348, what made the Oregon state constitutional restriction an unacceptable denial of due process was its absolute prohibition against judicial review of the amount of a punitive damages award. Although such damages could be vacated if there was no evidence at all to support them, once such evidence was found to exist, a reviewing court in Oregon was prohibited from considering whether the amount of the award was excessive or whether its size was so irrational as to suggest passion or prejudice. *Id.,* —— U.S. at ——, 114 S.Ct. at 2341, 129 L.Ed.2d at 348.

This is obviously not the situation here. Unlike Oregon, Missouri law requires that the amount of punitive damages awarded bear a reasonable relationship to the harm inflicted, albeit not necessarily an exact dollar relationship. *Carpenter v. Chrysler Corp.,* 853 S.W.2d 346, 365 (Mo. App. 1993); *Holcroft v. Missouri-Kansas-Texas Railroad Co.,* 607 S.W.2d 158, 163-164 (Mo.App. 1980). This is entirely consistent with this Court's holding in *TXO,* where such a relationship also existed even though the punitive damages affirmed were 526 times greater than the compensatory damages awarded.

As this Court noted in *TXO*, —— U.S. at ——, 113 S.Ct. at 2720, 125 L.Ed.2d at 379, quoting its earlier opinion in *Haslip*:

> . . . 'We need not, and indeed we cannot, draw a mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable that would fit every case. We can say, however, that [a] general concer[n] of reasonableness properly enter[s] into the constitutional calculus.'

It was just such a test of reasonableness that, consistent with *Haslip* and *TXO*, the Court of Appeals applied here. After conducting a careful and impartial review of the entire record, which the trial judge did not do, it properly concluded, "[c]onsidering Jacobs' net worth of over $51 million, [SBC's] actual damages of nearly $2.5 million, and the continuous nature and magnitude of Jacobs' deceit, the $2.7 million punitive damage award is not so excessive or unreasonable that it shocks our constitutional sensibilities or could only have resulted from irrational jury behavior." App. A, p. 12a.

Indeed, it was the very nature of the Court of Appeals' inquiry that afforded both parties, SBC and Jacobs alike, the due process safeguards that appellate review is intended to provide.

Regrettably, it was the trial judge who ignored *Haslip* just as he ignored, inexplicably, the compelling evidence that supported the jury's verdict. Had he applied the *Haslip* test to that evidence, as the Court of Appeals did, he too would have found that its criteria had been met, *viz.*, that SBC had proved (1) reprehensible and outrageous conduct of high magnitude, (2) a callous deceit of long and continuing duration, (3) Jacobs' awareness and chilling lack of remorse, (4) its willful concealment of the fraud, and (5) a reasonable relationship between the amount of punitive damages awarded and SBC's actual damages. *See Haslip*, 499 U.S. at 20-21, 111 S.Ct. at 1044-45, 113 L.Ed.2d at 21-22.

Under these shocking circumstances, and as the opinion of the Court of Appeals makes plain, there was no evidentiary basis whatever for the trial judge to have concluded that emotion rather than reason produced the punitive damages awarded. It is certainly not supported, as the Court of Appeals noted, by the size of the punitive award, which was only slightly more than SBC's actual damages. App. A, p. 12a.

After ten long years of litigation, it is a telling admission that Jacobs no longer insists there was no evidence to support the jury's verdict.[5] Had SBC failed to make a submissible case, one may be sure that Jacobs would now so argue in defense of the trial judge's flawed belief that the jury's verdict was irrational. Jacobs' failure to do so speaks volumes. It also makes Jacobs' misplaced reliance on *Honda, TXO* and *Haslip* all the more transparent.

The opinion of the Court of Appeals being entirely consistent with this Court's applicable precedents, and no issues of special importance existing, Jacobs' first asserted basis for certiorari is utterly without merit.

II. SETTLED PRECEDENT REQUIRED REVERSAL OF THE TRIAL JUDGE BECAUSE HE INVADED THE PROVINCE OF THE JURY BY IGNORING THE COMPELLING EVIDENCE THAT SUPPORTED ITS VERDICT.

Although a trial judge has broad discretion in granting a new trial, it is by no means unlimited. Where that discretion has been clearly abused, as here, it is not only proper but obligatory that a conscientious reviewing court reverse. Were it otherwise, a party's right to a jury trial would be meaningless.

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[5] "Jacobs seeks certiorari only with respect to the court of appeals' ruling reversing the district court's grant of a new trial on liability and damages. We do not seek review of the reversal of the district court's grant of JAML." Pet., p. 12 n.12.

This was underscored in *White v. Pence,* 961 F.2d 776 (8th Cir. 1992), where the time-honored distinction between the criteria for JAML and new trial was addressed. After first noting the criteria for JAML, *Pence* carefully explained how the criteria for a new trial in the face of a jury verdict differs, *viz.,* there must have been a demonstrable miscarriage of justice based on the "clear weight," "overwhelming weight," or "great weight" of the evidence. Furthermore, a "limited or abbreviated treatment" of the evidence simply will not do and will result in a reversal for abuse of discretion. *Id.* at 781.

In short, and as an obvious and necessary safeguard, the trial judge is required to fully explain his reasons for granting a new trial based on all the evidence, not just part of it lifted out of fair context, "so that this [reviewing] court can 'exercise a closer degree of scrutiny and supervision . . . in order to protect the litigants' right to a jury trial.' " *Pence,* 961 F.2d at 781, citing *Fireman's Fund Insurance Co. v. Aalco Wrecking Co.,* 466 F.2d 179, 187 (8th Cir. 1972). Moreover, since "the 'trial judge may not usurp the functions of a jury . . . [which] weighs the credibility of witnesses' . . . where reasonable men can differ in evaluating credible evidence, a new trial on the ground of weight of the evidence should not be granted." *Id.,* 961 F.2d at 781.

Although the trial judge here believed the jury was driven by emotion rather than reason, the unanimous panel's impartial examination of the record on appeal, which the trial judge admitted he did not have when he ruled sixteen months after the trial (App. B, p. 52a), did not support his belief. Simply because he disagreed with the jury, and would have evaluated the evidence and found the facts differently, hardly justified setting aside the jury's contrary assessment.

As stated in *Neufeld v. Searle Laboratories,* 884 F.2d 335, 339 (8th Cir. 1989), where the trial court was also reversed:

> Searle vigorously argues that the jury's verdict was a product of sympathy. . . . Searle had a chance to argue [its] alternate interpretations [of the evidence] to the jury. We cannot overturn the jury's harsher and equally plausible interpretation . . . merely because its view of the evidence was unsympathetic to Searle.

There is certainly no doubt, as this Court held in *Allied Chemical Corp. v. Daiflon, Inc., supra,* 449 U.S. at 36, 101 S.Ct. at 190, 66 L.Ed.2d at 197, that the granting of a new trial is generally confided to the exercise of a trial court's discretion This does not mean, however, as discussed *supra,* that such discretion is unlimited. As held in *Stafford v. Neurological Medicine, Inc.,* 811 F.2d 470, 474 (8th Cir. 1987), "[w]ith this authority comes the need to give reasons. A district court does not properly exercise its discretionary authority when it fails to articulate the analysis utilized to upset a jury's verdict."

The trial judge here failed to articulate that required analysis by ignoring the evidence that supported the jury's verdict. Since SBC's Constitutional right to a jury trial demanded nothing less in this fact-intensive case, he was properly reversed in accordance with settled precedent.[6]

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[6] ". . . [T]he right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any court of the United States, than according to the rules of the common law." U.S. Const. amend. 7.

CONCLUSION

Jacobs' petition for a writ of certiorari should be denied.

Respectfully submitted,

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